

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-4159

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA PAZ DE FERNANDEZ

Petitioner

- v -

IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

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Docket No. 75-4159

JUAN FRANCISCO FERNANDEZ-BLENCIO

Petitioner

- v -

IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

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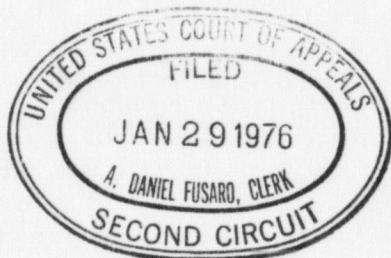
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Docket No. 75-4160

APPENDIX TO PETITIONERS' JOINT BRIEF

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JANUARY 1976

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LIST OF PARTS OF THE RECORD HEREIN CONTAINED

Administrative Record
Document Number

DESCRIPTION

Appendix
Page Number

2	DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED JUNE 26, 1975	1a
4	DECISION OF THE IMMIGRATION JUDGE, DATED MAY 5, 1975	2a
7	APPLICATION FOR WITHHOLDING OF DEPORTATION PURSUANT TO SECTION 243 (h), DATED FEBRUARY 21, 1974	3a
9	TRANSCRIPT OF DEPORTATION HEARING, DATED AUGUST 31, 1973	4a - 6a
10	DECISION OF THE IMMIGRATION JUDGE, DATED AUGUST 31, 1973	7a
11	ORDER TO SHOW CAUSE, DATED APRIL 18, 1973	8a
	PETITION FOR REVIEW TO U. S. C. A.	9a - 10a
6	LETTER TO IMMIGRATION AND NATURALIZATION SERVICE FROM DEPARTMENT OF STATE, DATED MARCH 7, 1975	11a - 12a

DECISION OF THE BOARD OF IMMIGRATION
APPEALS DATED JUNE 26, 1975

CHARGES:

Order: See. 241(a)(2), I&N Act (8 U.S.C. 1251

(a)(2) - Nonimmigrant visitor for
pleasure - remained longer (both
respondents)

APPLICATION: Withholding of deportation under section 243(h) of the
Immigration and Nationality Act

This is an appeal from a decision of the Immigration Judge on May 5, 1975, denying the respondents' motion to reopen these proceedings to permit them to apply for withholding of deportation under section 243(h) of the Immigration and Nationality Act. The appeal will be dismissed.

On August 31, 1973, the respondents were found deportable and given six months voluntary departure in lieu of deportation. Both failed to leave.

We have examined the record. We do not find that the respondents have made a prima facie showing that they have a well-founded fear of persecution in Uruguay on account of race, religion, nationality, membership of a particular social group, or political opinion. Matter of Bohrwald, Interim Decision 2219 (BIA 1973). The appeal accordingly is dismissed.

ORDER: The appeal is dismissed.

DECISION OF THE IMMIGRATION JUDGE DATED
MAY 5, 1975

Respondents ask that their deportation hearings be reopened to apply for relief under Section 243(h) (8 U.S.C.1253(h)). The Trial Attorney submits a brief in opposition.

On August 31, 1973 an order was entered by another Immigration Judge granting respondents voluntary departure to February 28, 1974 with an alternate order of deportation to Uruguay if they failed to depart. They both failed to leave.

A motion to reopen deportation proceedings will not be granted unless evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing, 8 CFR 242.22.

Furthermore, a motion to reopen must be supported by affidavits or other evidentiary material, 8 CFR 103.5. Only respondents affidavit was submitted to support the motion. It does not allege any new evidence to warrant reopening of these proceedings. Accordingly, the motion must be denied.

ORDER: IT IS ORDERED that respondents' motion to reopen deportation proceedings be, and the same hereby is, DENIED.

APPLICATION FOR WITHHOLDING OF DEPORTATION
PURSUANT TO SECTION 243(h), DATED FEBRUARY
21, 1974

JUAN FRANCISCO FERNANDEZ and his wife MARIA FERNANDEZ being duly sworn, depose and say:

That they are requesting a stay of deportation in case we are ordered deported and a Hearing be held so that we may apply for Relief under Section 243 (H) because it is our belief that we would be subjected to persecution should we have to return to Uruguay. (More specifically) by the Tupamaros, a leftist group.

The above has been read to us in Spanish.

Signature
JUAN FRANCISCO FERNANDEZ

Signature
MARIA ORFELIA FERNANDEZ

TRANSCRIPT OF DEPORTATION HEARING
HELD AUGUST 31, 1973

1. IMMIGRATION JUDGE: Case A20 097 262, represented by:
2. OF COUNSEL: Edward Bernstein, Your Honor, 373 Avenue S in Brooklyn.
3. IMMIGRATION JUDGE: And Mr. Anthony Alvarenga in Spanish.
4. IMMIGRATION JUDGE TO FEMALE RESPONDENT: (through interpreter):
5. Q. You are Maria Paz de Fernandez? 6. A. Yes.
7. IMMIGRATION JUDGE TO MALE RESPONDENT:
8. Q. And you are Juan Fernandez-Blengio? 9. A. Yes.
10. Q. And you are both represented by Mr. Bernstein?
11. A. (by both): Yes.
12. IMMIGRATION JUDGE: Are you ready Counsel?
13. MR. BERNSTEIN: Yes, your honor.
14. IMMIGRATION JUDGE: Do you agree that in lieu of the original Order
15. to Show Cause which has been misfiled I may proceed on the basis of
16. a copy furnished by the government?
17. MR. BERNSTEIN: Yes, your honor.
18. IMMIGRATION JUDGE: With full force and effect as though it were the original?
19. MR. BERNSTEIN: Agreed, your honor.
20. IMMIGRATION JUDGE: With the agreement that the original may be substituted,
21. when found. Now, do you now concede service of the Order to Show Cause?
22. MR. BERNSTEIN: Yes, I do, your honor.
23. IMMIGRATION JUDGE: And to its entry in evidence?
24. MR. BERNSTEIN: Yes, I do, your honor.
25. IMMIGRATION JUDGE: Exhibit One. Do you concede the truth of the allegation?
26. MR. BERNSTEIN: Yes, I do, your honor.

1. IMMIGRATION JUDGE: You do not select a country of deportation, but will
2. agree to Uruguay at the government's request. Is that right?
3. MR. BERNSTEIN: Yes, your honor.
4. IMMIGRATION JUDGE: No application under Section 243(h)?
5. MR. BERNSTEIN: No, your honor.
6. IMMIGRATION JUDGE: We had an off the record conversation and you allege
7. there is much turmoil from opposing forces in Uruguay which has been shown
8. in newspaper columns. Your clients recognize, because as you so advise me
9. that the law does not permit a successful application under Section 243(h)
10. since there is no persecution at the hands of the government, but you ask
11. the government to forbear and to permit them to remain until conditions
12. change, and, if they change for the worse, if the Uruguayan government be-
13. comes Communist, you reserve the right in that event for them to apply for
14. 243(h) relief?
15. MR. BERNSTEIN: Yes, your honor.
16. IMMIGRATION JUDGE: Will the government agree to that?
17. MR. TRAVERS: Yes, your honor.
18. IMMIGRATION JUDGE: And the government has offered you, in the light of your
19. remarks that you seek six months voluntary departure, is that right?
20. MR. BERNSTEIN: Yes, your honor.
21. IMMIGRATION JUDGE: Do you accept?
22. MR. BERNSTEIN: I do.
23. IMMIGRATION JUDGE: Do you waive any questioning, Mr. Travers?
24. MR. TRAVERS: Yes, sir.
25. IMMIGRATION JUDGE TO BOTH RESPONDENTS:
26. Q. I am giving both of you six months voluntary departure with an alternate

1. order of deportation. I am giving you six months to leave this country
 2. and will order you deported if you don't. Do you understand?
 3. A. (by both): Yes.
 4. Q. I serve you both with orders which conform to your approval.
 5. IMMIGRATION JUDGE: Final order?
 6. MR. BERNSTEIN: Yes, your honor.
-

DECISION OF THE IMMIGRATION JUDGE DATED
AUGUST 31, 1973

The above-named respondent having appeared before me for hearing on this date, pursuant to the Order to Show Cause in this proceeding, and having admitted that the factual allegations contained therein are true, and having further admitted that she is deportable from the United States on the charges set forth therein, I am satisfied and have concluded that deportability has been thereby established.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government on or before February 28, 1974, or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Uruguay on the charges contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to

ORDER TO SHOW CAUSE DATED APRIL 18, 1973

UPON inquiry conducted by the Immigration and Naturalization Service,
it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Uruguay and a citizen of Uruguay;
3. You entered the United States at New York, New York on or about
October 12, 1969;
4. At that time you were admitted as a nonimmigrant visitor for pleasure.
5. You have been authorized to remain in the United States until October
12, 1970.
6. You remained in the United States thereafter without authority.

And on the basis of the foregoing allegations, it is charged that you
are subject to deportation pursuant to the following provisions of law:

Section 241(a)(2) of the Immigration and
Nationality Act, in that, after admission as a
nonimmigrant under Sec. 101(a)(15) of said act
you have remained in the United States for a
longer time than permitted.

PETITION FOR REVIEW TO U.S.C.A.

The United States Court of Appeals for the Second Circuit has jurisdiction of this petition under the provisions of Public Law 87-301, Sec. 106 of the Immigration & Nationality Act 8 U.S.C. 1105a.

2. That the petitioner resides in the City of New York, County of the Bronx.

3. That the respondent herein has its office within the jurisdiction of this Court.

4. That six months have not elapsed since the date of the final order from which review is sought.

5. That the petitioner is a citizen and native of Uruguay. Mr. Fernandez entered the United States on or about October 12, 1969, at New York, N.Y.

6. That the petitioner has made a motion for the reopening of the deportation proceeding under Section 243(h) of the Immigration & Nationality Act. He has stated under oath:

a. That he would be subjected to persecution should he have to return to Uruguay, by the Tupamaros, a leftist group.

7. That the Immigration Judge denied the application under Section 243(h) of the petitioner and the petitioner appealed to the Board of Immigration Appeals in Washington, D.C. The Board of Immigration Appeals on June 26, 1975 dismissed the appeal of the Petitioner (See Exhibit "A" attached herewith).

8. That the petitioner has been ordered to appear for actual deportation on July 31, 1975. (See Exhibit "B" attached herewith).

9. That the deportation of the petitioner would amount to a great

miscarriage of justice as he would be subject to physical violence in his country.

10. That the petitioner has exhausted all administrative remedies available to him as of the present time.

11. That if the departure of the petitioner was enforced, it would involve a constitutional question, involving among other matters, to wit:

The denial of due process in that he was not even granted a hearing and the motion was summarily and arbitrarily dismissed.

WHEREFORE, the petitioner respectfully prays that this Court review the decision complained of and that the same be held null and void and set aside on the grounds that it is against the weight of evidence as no evidence was introduced contrary to the affidavit of the petitioner, and for such other and further relief as to this Court may seem just and proper.

LETTER TO IMMIGRATION AND NATURALIZATION
SERVICE FROM DEPARTMENT OF STATE DATED
MARCH 7, 1975

Mr. Maurice F. Kiley
Immigration & Naturalization
Service
20 West Broadway
New York, N.Y. 10007

Dear Mr. Kiley:

Reference is made to your letter of October 30, 1974, concerning the request for asylum of Juan Francisco Fernandez and his wife Maria Paz de Fernandez, A20 097 202 and A20 098 214 respectively, both citizens of Uruguay.

On the basis of the information provided, we do not believe that Mr. and Mrs. Fernandez have made valid claims to asylum. They allege that they cannot return to Uruguay because in 1969 they were constructing a country house and were approached by two strangers to buy the house. They claimed to have been repeatedly approached and offered any price for the home, but still refused to sell it. They claim that during this period of time they received anonymous threats and on one occasion, when Mr. Fernandez went to visit the house, he was pulled off his motorcycle and cut on the arm by the same two men who wanted to buy the house. They further allege that they discovered that the house behind the one they were constructing was owned by the Tupamaros, who held meetings there, and that the Tupamaros had wanted their house for expansion purposes. Mr. Fernandez claims that he never went to the police because "everyone appeared to be a terrorist."

In the first instance, the Fernandez can give no substantial indication

that the persons wanting to buy their house were Tupamaros. Further, they in no way attempted to seek protection of the local authorities. The current government in Uruguay can hardly be considered too friendly to the Tupamaros and that organization itself has been largely decimated in recent years. Thus there is no reason to believe that Mr. and Mrs. Fernandez would face persecution on the part of the Government of Uruguay and it is further unlikely they would suffer retaliation at the hands of the Tupamaros for alleged incidents having taken place in 1969.

On the basis of the information thus far submitted, we are unable to conclude that Mr. and Mrs. Fernandez should be exempted from regular immigration procedures on the grounds that they would suffer persecution on account of race, religion, nationality, political opinion, or membership in a particular social group should they return to Uruguay. Should they present additional information which to the Service seems to require further review, we will be pleased to reconsider the case.

Sincerely,
Signature
Louis A. Wiesner
Director
Office of Refugee and
Migration Affairs

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COPY RECEIVED
Thomas J. Cahill
UNITED STATES ATTORNEY
1-29-76
mjb

